LAKE ERIE GREENHOUSE MANAGEMENT & LEASING CORPORATION OPERATING AS CLIFTON PRODUCE v. AGRISTAR PRODUCE LLC.
PACA Docket No. R-97-0075.
Order of Dismissal filed December 6, 2000.

Election of Remedies – Canadian counterclaim not compulsory.

Where a Canadian firm filed a formal reparation complaint before the Secretary, and thereafter filed a counterclaim against the reparation Respondent in civil court in Ontario, Canada covering the same breach as alleged in its complaint before the Secretary, it was found, based on material filed by counsel, that counterclaims are not compulsory in Canada, and that Complainant had made an election between its PACA remedy and the Canadian civil court remedy. The Complaint was dismissed.

George S. Whitten, Presiding Officer.
Frank C. Ricci, Leamington, Ontario, Canada, for Complainant.
Kenneth D. Nyman, Boise, Idaho, for Respondent.
W. Anthony Park, Boise, Idaho, for Respondent.
John Mill, Windsor, Ontario, Canada, for Respondent.
Decision and Order issued by William G. Jenson, Judicial Officer.

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. § 499a *et seq.*). On August 21, 1996, Complainant (hereafter sometimes Clifford) filed an informal reparation complaint before the Secretary, and on September 24, 1996, filed a formal complaint. Cliford's complaint seeks reparation from Respondent (hereafter sometimes Agristar) on the basis of an alleged failure to pay the purchase price for tomatoes sold by Clifford to Agristar and shipped from Canada, to Agristar in Idaho. Agristar filed an answer before the Secretary on October 29, 1996. Agristar's defense was that Clifford promised to give Agristar 60% of its production, and breached the promise. Agristar claimed a set-off, and sought to recover the excess of damages over the set-off in a counterclaim before the Secretary, also filed October 29, 1996. On September 12, 1996, Agristar filed a claim in the Ontario Court (General Division) against Cliford covering the same breach as is alleged in its counterclaim before the Secretary. Clifford then filed, on Nov. 4, 1996, a counterclaim in the Ontario Court based on the same cause of action as is alleged in Clifford's reparation complaint before the Secretary.

Following the filing of the pleadings before the Secretary, the parties were advised by administrative personnel of this Department that this matter could proceed only if the Complainant's counterclaim filed in the Canadian court was compulsory.[1] Thereafter, based upon a letter from Complainant's Canadian counsel

[1] We have held many times that section 5(b) of the Act forces litigants who are before the Secretary to elect whether they will pursue their action in a civil jurisdiction or this administrative forum. See *Hastings Potato Growers Association v. Southern Planters Company,* 20 Agric. Dec. 279 (1961). The

(who admitted that he was not sure what was meant by "compulsory"), the administrative personnel determined that the counterclaim was "compulsory or necessary," and the case was referred for hearing. Respondent contended in response to this ruling that the Canadian counterclaim was not compulsory.

On August 24, 1999, the Superior Court of Justice, Windsor, Ontario, Canada issued what amounts to a default judgment against Agristar, that firm having withdrawn its complaint before that tribunal. On February 2, 2000, Complainant's counsel moved for a the issuance of a reparation order based on the alleged *res judicata* effect of the Canadian court judgment. This motion was served on opposing counsel, and counsel for both parties proceeded to brief the matter, and also to address the question of whether counterclaims are compulsory under Canadian court procedure.

The question of whether the Canadian counterclaim was compulsory is pertinent because of the provision in the Act providing for an election of remedies. That provision has been interpreted by us to not apply to a reparation claim that is also the subject of a compulsory counterclaim in state or federal court.[2] The applicable section of the Act refers to liability for violation of section 2 of the Act, a federal law having application only within the United States, and therefore it is appropriate to inquire whether the alternative presented in the election of remedies provision has any application to an action brought in a foreign jurisdiction. Section 5b of the Act (7 U.S.C. § 499e(b)) states:

> "Such liability [for violation of section 2] may be enforced either (1) by complaint to the Secretary as hereinafter provided, or (2) by suit in any court of competent jurisdiction; but this section shall not in any way abridge or alter the remedies[3] now existing at common law or by statute, and the provisions of this Act are in addition to such remedies."

In *M. S. Thigpen Produce Co., Inc. v. The Park River Growers, Inc.*, 48 Agric. Dec. 695 (1989) we stated:

> While it appears from an examination of analogous cases that a number of courts might treat the Perishable Agricultural Commodities Act as creating

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only exception is where the claimant before the Secretary is also before the civil forum because of having filed a compulsory counterclaim. See *Kurt Van Engel Commission Co., Inc. v. Schultz Sav-o Stores, Inc.*, 48 Agric. Dec. 731 (1989).

[2] *Kurt Van Engel Commission Co., Inc. v. Schultz Sav-o Stores, Inc.,* 48 Agric. Dec. 731 (1989).

[3] The term "remedies" refers to procedural rights, not to substantive rights. *Rothenberg v. H. Rothstein & Sons*, 183 F.2d 524, 21 A.L.R.2d 832 (3rd Cir. 1950).

a distinct cause of action for the violation of Section 2, the general rule and the better rule is to the contrary. Moore, in treating the question makes the following observations:

> What constitutes a single cause of action for these purposes [application of doctrine of res judicata barring second suit on same cause of action] has been a troublesome question. Generally, it has been held that the "cause of action," or "claim," as it is referred to in the Restatement (Second) [Judgements], is bounded by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies. Thus, a judgement in an action to settle Indian land claims under the 1881 Treaty was a bar to a second suit involving the same land but relying on the 1895 Treaty. And a judgement in an action in the district court asserting that plaintiff's discharge was a violation of the Age Discrimination In Employment Act barred a subsequent action asserting that the same discharge was a breach of his employment contract. Similarly, a judgement in a possessory action in the state court barred a subsequent action in the federal court charging that his eviction violated his first amendment rights. And a summary judgement for defendant corporation in a suit on a note, pitched on the theory that the corporation was the alter ego of the debtor barred a later suit by the assignee of the note against the receiver of the corporation charging "conspiracy" and "joint venture." As a general principle, then, the plaintiff must assert in his first suit all the legal theories that he wishes to assert, and his failure to assert them does not deprive the judgement of its effect as res judicata. (Moore's Federal Practice, 2nd ed. 1984 ¶ 0.410, p. 350-351.)

From the above it follows that, although federal PACA law is not applicable in Canadian courts, such courts are not thereby rendered incompetent to hear the underlying cause of action. Causes of action based upon breach of contractual obligations, and which underlie most of the prohibitions of section 2[4], are capable of litigation in both Canadian and American forums. This conclusion accords with the evident intent of Congress which was to avoid simultaneous litigation based on the same subject matter, while preserving the unique PACA remedy to those litigants who filed with the Secretary, and were willing to forego seeking enforcement of their claim in an alternate forum.

Under the Federal Rules of Civil Procedure (and in state courts which follow the

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[4]For instance, section 2(4) makes it unlawful for a licensee "to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any" transaction in interstate or foreign commerce.

Federal Rules) a counterclaim is compulsory only if it meets all four of the following conditions: (1) It must arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. [Any claim that is "logically related" to another claim that is being sued upon is properly the basis for a compulsory counterclaim. Only claims that are unrelated or are related but within the exceptions, need not be pleaded. See *City of Cleveland v. Cleveland Electric Illuminating Co.*, 570 F.2d 123 (6th Cir. 1978).]; (2) It must be matured and owned by the pleader at the time he serves his pleading; (3) It must not require for its adjudication the presence of third parties of whom the court cannot acquire personal jurisdiction; and (4) It must not have been, at the time the original action was commenced, the subject matter of another pending action.[5] The term "compulsory" means that if a claim meeting the above criteria is not filed it is forever barred.

It is apparent from the material that has been filed by counsel that counterclaims in Canada are not compulsory. We therefore conclude that Complainant and Respondent in this matter made an election to proceed before the Ontario court when the complaint and counterclaim were filed before that court.[6] Accordingly, Complainant's motion for the entry of a reparation award is denied, and the complaint and counterclaim are dismissed.

Copies of this order shall be served upon the parties.

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[5]A PACA reparation action qualifies as "another pending action" [the phrase "another pending action" includes administrative proceedings. *Bethlehem Steel Co. v. Lykes Bros. Steamship Co.*, 35 F.R.D. 344 (D.D.C. 1964)] only if a formal complaint has been filed. A pending informal complaint is not viewed as commencing an "action." See *Trans West Fruit Co., Inc. v. Ameri-Cal Produce, Inc.,* 42 Agric. Dec. 1955, 1957 n. 2 (1983).

[6]See *Symms Fruit Ranch, Inc. v. Arizona Fresh Foods, Inc.*, 41 Agric. Dec. 351 (1982).